IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition No. 1605 of 2006

Smt. Housabai Krishna Naik ..Petitioner

vs.

Dagadu Pandurang Pawar
and others ..Respondents

Shri U.P.Warunjikar for petitioner
Shri P.P.Killedar for respondent nos.1 and 2.

CORAM: S.B.MHASE J.
20th March, 2006

P.C.

1. Rule. By consent, returnable forthwith.

2. The order dated 24th January, 2006 passed below Exh.40 in Reg.Civil Suit No.336 of 2003 by the IInd Joint Civil Judge, Jr.Dn.,Karad is challenged by filing the present petition.

3. The suit was for specific performance of the agreement bearing Reg.Civil Suit No.332 of 2003 is pending in the Court of Civil Judge, Jr.Dn., and the said suit has been filed by the respondent. The suit is based on a document dated 28th September, 1999 whereby it is agreed to sell the suit land for consideration of Rs.21,000/-. The defendant has filed the written statement stating that

the thumb impression on the said agreement to sell is not that of the petitioner/original defendant no.1 and the petitioner has not executed the said document. It appears that on 18th October, 2005 an application was moved with a prayer that the document be sent for examination in comparison with the admitted thumb impression of the petitioner to the hand writing expert at Pune. It appears that the said application was pending for a pretty long period and it is rejected on 24th January, 2006. The learned counsel Shri Warunjikar submitted that the application was made well in advance prior to commencement of the evidence. However, at that time it was kept without passing any order. Thereafter evidence was recorded and after the evidence the petitioner pressed for the said application. The Court has rejected the said application on the ground that the document is registered one and burden to prove execution of the document of agreement to sell is upon the plaintiff and the suit is not filed by the plaintiff for declaration or cancellation of the agreement dated 28th September, 1999 and if the plaintiff failed to discharge the burden then he will meet the consequences. I thus find that it is not necessary to linger

the matter any further and to send the document for examination. Needless to say that burden of proof is on the plaintiff and the plaintiff has entered into the witness box and has deposed to the effect that the said thumb impression is that of the defendant. The plaintiff has proved the contents of the documents and, therefore, the document was exhibited. Thus, the burden of proof is discharged by the plaintiff/respondent. The Court has lost sight of the fact that burden of proof is fixed on the plaintiff still the onus of proof is always shifting between the parties and in view of the deposition of the plaintiff/respondent that onus is shifted on the defendant and, therefore, the defendant/petitioner instead of relying upon the simplicitor oral denial wants to make out a full proof case that the said thumb impression is not of the defendant and, therefore, insisted for having examination of the said thumb impression through the expert. If the expert's evidence comes supporting the defendant/petitioner that witness can be examined by the defendant/petitioner and thus there will be best possible evidence to disprove the fact, the onus of which has been shifted on the respondent/defendant. This

aspect has been overlooked by the Trial Court. For just and fair trial of the matter and further to avoid remand of the matter from the Appellate Court it is necessary to allow the application Exh.40. The writ petition is allowed. The order dated 24th January, 2006 from Reg.Civil Suit No.332 of 2003 is hereby set aside. The application below Exh.40 in the said civil suit is hereby allowed and it is directed that the disputed thumb impression along with the admitted thumb impression of the petitioner be sent to the appropriate authority as prayed for in the said application. Rule is made absolute accordingly.

(S.B.MHASE J.)